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SANFORD LEVINSON

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"Getting Religion": Religion, Diversity, and Community in Public and Private Schools

WITH MEIRA LEVINSON

Introduction

There are many arguments for and against school vouchers or, should "vouchers" be too politically loaded or descriptively restrictive a term, the use of public funds, either directly or indirectly, to support private (including religious) schools. Some of these arguments are explicitly constitutional, based on one or another reading of the Establishment and Free Exercise Clauses of the First Amendment. Although one of us is a constitutional lawyer, we emphasize at the outset that this paper is not in any way an analysis of the validity of such legal arguments, even if we make occasional descriptive reference to them. Here we are interested in the more general normative and empirical debates surrounding such aid. If it is a good idea, then the possibility of its being unconstitutional counts against the Constitution (or judicial doctrine), not against the proposal, and we might then turn our attention to the best ways of changing constitutional understanding, whether through the appointment of different judges or formal amendment of the Constitution. Concomitantly, if such aid is a bad idea, then it is irrelevant that it might be constitutional. The terms "constitutional" and "unconstitutional" are not at all necessarily synonymous with "meritorious" and "unmeritorious," and it is the latter that is exclusively our focus.

There are, of course, many normative questions raised by proposals for aid to religious schools. We focus on one particularly common—and, for

many, especially potent—of such arguments against vouchers and other such aid. This involves the ostensible tension between such programs and the achievement of a desirable degree of diversity within the aided schools themselves. That is, heterogeneous schools are deemed by many contemporary liberals (and, no doubt, others as well) to be better than homogeneous ones, and the dispersion of public funds to private schools, whatever the process by which this is done, is viewed as encouraging homogeneity and therefore as generating public harm rather than benefit. Thus, for example, it is often suggested that school vouchers will result in some students going to private schools that by design are segregated along one or more axes. This essay focuses on one such axis, religion, but many others deserve attention as well, including, but not limited to, nonreligious belief systems; race or ethnicity; achievement; gender; sexual orientation; raw intelligence, as ostensibly measured by aptitude or similar tests; and/or socioeconomic status. The assumption, obviously, is that in the absence of a dispersion to ideologically self-contained private schools, these students would remain in public schools, and that their very presence would promote the kinds of diversity that are desirable.

Why is diversity so desirable? Although we will offer a more elaborate answer to this question later, we can offer in outline form two especially common defenses of diversity. First, a diverse student body can help to develop the toleration of others—perhaps we should refer to "Others"—that is functional to developing the liberal democratic civic project that relies on mutual respect. This view is articulated by former university presidents William Bowen and Derek Bok in their highly influential defense of affirmative action at the university level, but the arguments hold for primary and secondary education as well: Diverse student bodies help to produce "greater 'cultural awareness across racial lines' and stronger commitments to improving racial understandings."¹ One can substitute practically any term for "racial" and the argument still works. This is the "civic-education" or "civic-toleration" justification.

A second, quite different, argument emphasizes the relevance of a diverse student body to better enabling students to develop their own autonomy by interacting with people who hold beliefs and lead lives that are different from their own. This argument can be traced back at least to John Stuart

This essay was originally published in *School Choice: The Moral Debate*, edited by Alan Wolfe (Princeton: Princeton University Press, 2003).

1. William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 228 (1998).

Mill, who in *On Liberty* defended the importance of tolerating experiments in living not only because of the beneficial effects of learning to accept the existence of different approaches to life, but also because confrontation with such experiments would possibly lead the observer to evaluate one's own values and conduct and, perhaps, to change in quite dramatic ways the direction taken in one's life. Even if no change takes place, a person forced to confront significantly different ways of life would have a far sharper sense of why she remained committed to her own views. It is no coincidence that another university president, Harvard's Neil Rudenstine, when presenting his own reflections (and defenses) of the uses of diversity, quoted Mill's insistence that a person "[m]ust be able to hear [diverse opinions] from persons who actually believe them, who defend them in earnest, and do their very utmost for them. He must . . . feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of . . ."² Presumably, if the person challenged cannot "dispose of" the difficulties presented to her own views, then she will change them and, as a result, partake in a very different form of life than might otherwise have been the case. This is the "autonomy-promotion" justification, and taken together, these are, albeit very sketchily, the "diversity arguments."

The relationship between vouchers (or other relevant forms of aid) and the diversity arguments is fairly straightforward. First, as mentioned previously, opponents of vouchers often focus on the homogeneity of the schools strengthened as the result of such aid.³ That is, some parents are

2. Neil L. Rudenstine, "The Uses of Diversity," *Harvard Magazine*, March–April 1996, at 50. Rudenstine goes on to offer as a key example the fact that Henry Adams's graduating class of 1858 at Harvard included three Virginians, including the son of Robert E. Lee. As Adams put it, writing in the third person, "for the first time Adams's education brought him in contact with new types and taught him their values. He saw the New England type measure itself with another. . . ." *Id.* at 51. Rudenstine goes on to note that Adams's experience "altered Adams' consciousness, and forced him to confront and assess a type of person he had never before known. It drove him to reach new conclusions about himself and his own limitations. . . ." *Id.*

3. See, e.g., Jeff Spinner-Halev, "Extending Diversity: Religion in Public and Private Education," in *Citizenship in Diverse Societies* 68–95 (Will Kymlicka and Wayne Norman, eds., 2000). He suggests that "one of the basic worries" about parochial schools and their increase (especially if they receive additional public support) is that "the more parochial schools there are, the less students of different backgrounds will mix with one [an]other; the less they will learn how to cooperate with one another or realize that others with different views exist. This leaves the children in private schools isolated." *Id.* at 81. Spinner-Halev's interesting essay in part tracks our own concerns, especially insofar as he rightly insists that "[a] diversity that excludes religion and religious students is not very diverse." *Id.* at 70. Unfortunately, we became aware of his essay

assumed to want to send their children to schools whose student body will be very similar along a given metric. (Were there no such parental preferences, then one can assume that little or no advantage would be taken of policies that would allow greater homogeneity along the particular metric.) Second, they also assert that by enabling such parents, whether smart, committed, active, religious, white, what have you, to take their involvement and their children to private schools, vouchers leave public schools and the students stuck in them worse off than before. This latter argument is usually made from an egalitarian perspective, where the focus is the harm done to public schools by losing involved parents. But the "cream-off effect" argument also can derive strength from the diversity argument, insofar as the disappearance of religious, white, lower-middle-class, or other group of students from the public schools leaves the public schools less diverse along that axis, and therefore (drawing on the diversity arguments) harms the civic education and/or autonomy development of public school students left behind.

Our aim in this essay is not to rehash the pros and cons of these quite well-known arguments in the course of justifying or discrediting them. Instead, we are interested in examining the normative consequences of applying them to a question that seems to have been incongruously (and remarkably) overlooked in the general debates regarding "diversity," which have focused almost exclusively on race and ethnicity. The question is this: Does the liberal-democratic state and/or do children have a compelling interest in children going to school in a diverse *religious* setting? Positive (and negative) answers abound to the racial version of this question; the importance of "mingling together" is the foundation of most defenses of so-called diversity admissions policies by universities,⁴ and it (along with important egalitarian considerations) also undergirds the attempt by many public school systems to preserve "racial balancing" policies against the recent antibusing and antidesegregation backlash.⁵ Interestingly, however, the religious ver-

only after preparing our own and therefore do not give it the extended attention that it deserves. The same is true, alas, of another essay in *Citizenship in Diverse Societies*, Eamonn Callan, "Discrimination and Religious Schooling," pp. 45–67, which offers an especially interesting discussion of educational policy in Canada, which takes a considerably different approach to state funding of religious schools than is found in the United States.

4. See chapter 1.

5. See Gary Orfield, Susan E. Eaton, and The Harvard Project on School Desegregation, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (1996), esp. chs.

sion of this question has gone virtually unconsidered except to the extent that it applies to the autonomy-development and civic-membership interests specifically of children of religious parents who want to remove them from public education entirely.

The best-known case regarding the education of religious children, *Wisconsin v. Yoder*,⁶ is discussed in terms of whether a state can force Amish children to attend schools at least through the tenth grade or whether, on the contrary, the parents of these children can terminate their formal schooling after eight years in order to further their socialization into the Amish community itself. (Interestingly enough, *Yoder* did not involve either the presence of alternative Amish schools or "home-schooling" by Amish parents.) In both the majority and minority opinions, careful attention was paid to the implications for maintaining both civic order and the Amish community, as well as for the Amish youth themselves. But although Justice Douglas, dissenting, issued a strong objection to the Court's seeming willingness to ignore the particular autonomy interests of the affected *Yoder* children, he wrote nary a word about any losses to the potential classmates of the Amish children whose absence from the public schools was upheld.

The same is true with regard to the much-discussed case of *Mozert v. Hawkins*,⁷ which involves a clash between fundamentalist religious parents and a local school board with regard to the necessity that each and every child be exposed to the particular reading program offered by the school system, one of whose aims is precisely to expose children to different viewpoints and to teach them critical thinking skills. Much has been written about the loss (or gain) to the particular children of Vicki Frost if they cannot continue to attend public schools or "opt out" of having to confront the reading program chosen by the school board. Almost nothing has been written about the losses suffered by other children if the plaintiff's children retreat from the public schools. Finally, there are, most recently, the so-called Yale Five, who objected to having to live in Yale student dormitories that they claimed violated certain rules and behaviors attached to Orthodox Judaism. Yale defended its requirement on the ground that the Orthodox Jewish students would greatly benefit from living in dormitories consisting

of diverse students. Less was said about the benefits to other students of having to live with — and to some degree accommodate themselves to — the Orthodox Jews.

Even when compromises, such as allowing students to opt out of reading programs or residence requirements, are suggested they most often are defended by statements to the effect that "these very specific, named children will be better off and will be exposed to a wider range of opinions if they stay in the public schools (or live in the Yale dorms), and, therefore, we must accept these compromises as unfortunate but necessary costs of allowing them to achieve such benefits." This is thought preferable to having the students withdraw, though the metric of evaluation is entirely in terms of those specific students' own interests. This assessment, of course, may be correct. Yet it is worth noting how rarely consideration is given to the consequences for *nonfundamentalist* children or *non-Orthodox* students who, by stipulation, face the possibility of remaining in public schools (or private universities) now lacking the diversity provided by their former classmates.

A similar point can be made with regard to the design of assignment zones, or what the British call "catchment areas," for public schools. Despite the vast amount of literature arguing in favor of diverse public schools and, concomitantly, the conscious use of demographic materials relating to race or ethnicity when constructing school boundaries (or deciding on the use of busing to achieve certain kinds of demographic balance), we know of no serious consideration that has ever been given to whether public schools might alter their catchment areas to achieve "religious balancing," or, less drastically and therefore potentially more intriguingly, offer incentives (e.g., a kosher or halal cafeteria, or an adjusted school schedule, including, say, no athletic events on Friday or Saturday) to attract religious-minority families to a school located in an otherwise all-Christian area of town. Thus our title — "Getting Religion" — which is intended, among other things, to suggest the possibility that it is a positive good if schools get those with religious views (and behaviors) among their student bodies and, therefore, that one should consciously design educational policy with a view to maximizing that possibility.

It is possible, of course, that the reason for such an absence of much discussion of this question is legal; many lawyers would no doubt say that it would be unconstitutional for such factors to play a part in designing public school boundaries. As indicated earlier, even if this is so, we are still entitled

11 and 12; Jeffrey Rosen, "The Lost Promise of School Integration," *New York Times*, 2 April 2000, at 4: 5.

6. 406 U.S. 205 (1972).

7. The key opinions are those presented in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988).

to ask if this is a cost, rather than a benefit, of current constitutional norms. If it is viewed as a cost, of course, then that would be a good reason for supporting changes in the interpretation of these norms.

There are many attributes beyond the religious, of course, that lend themselves to a "diversity" analysis. So a second focus of this essay is how religious diversity interests balance against other types of diversity. For example, even if the answer to the question posed above is yes, that it is a compelling interest of either the state or its children for children to be educated with children whose religious sensibilities are significantly different from their own, it is possible that a school that is not religiously diverse (e.g., a private Baptist academy or a Jewish yeshiva) will be more racially or socioeconomically diverse than other private or public schools. Indeed, as one of us has recently argued, one reality (and, perhaps, significant weakness) attached to invocations of the "diversity" argument is precisely that "diversity," if taken seriously, is truly without limit insofar as there are almost literally an infinite number of ways that sets of humans can be described as interestingly different (and thus diverse) from one another.⁸ Or, as Judge Weiner put it by way of chastising the University of Texas Law School with regard to its own "diversity" defense of a program that was in fact limited to African- and Mexican Americans: "[B]lack and Mexican Americans are but two among any number of racial or ethnic groups that could and presumably should contribute to genuine diversity."⁹ Surely he is correct; moreover, as already suggested, there is no good reason to think only in terms of "racial or ethnic groups" when imagining desirable forms of diversity.¹⁰

8. See chapter 1.

9. *Hopwood v. Texas*, 78 F.3d 932, 965–66 (6th Cir. 1996) (Weiner, J., concurring).

10. This point is made at length in the recent decision involving the admissions program at the University of Michigan Law School, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich., Southern Div., 2001), where Judge Friedman expressed strong reservations about the coherence of the Law School's claimed commitment to "diversity." He wrote, for example, that

there is no logical basis for the law school to have chosen the particular racial groups which receive special attention under the current admissions policy. . . . During some of the years at issue in this lawsuit, the law school bulletin indicated that special attention has been given to "students who are African American, Mexican American, Native American, or Puerto Rican and raised on the U.S. mainland." The law school has failed to offer a principled explanation as to why it has singled out these particular groups for special attention. Certainly, other groups have also been subjected to discrimination, such as Arabs and southern and eastern Europeans to name but a few, yet the court heard nothing to suggest that the law school has concerned itself as to whether members of these groups are represented "in meaningful numbers." No satisfactory explanation was offered for distinguishing between Puerto Ri-

One might well believe that any given "diversity" is beneficial to all concerned. Catholic schools, for example, are notable for drawing families across many racial and socioeconomic lines. It seems quite probable that the widespread availability of vouchers or other programs of public aid would allow many other denominationally identified religious schools to draw from a much wider socioeconomic range than would a typical prep school—even one that courted diversity—or a neighborhood public school. After all, the continued (or renewed) segregation of students in public schools—whether it be all lower-income African Americans in urban Atlanta or Detroit, or mostly middle- and upper-income whites in Scarsdale—has been well documented.¹¹ Furthermore, as we will discuss, certain non-religious but otherwise "special emphasis" private schools¹² (e.g., military academies, Waldorf or Rudolf Steiner schools, "free" schools, mountain or wilderness academies, etc.) are for a variety of reasons far less diverse along most axes than are many religious schools. Even self-consciously "progressive" schools, both public and private, have a hard time attracting families that are nonwhite and non-middle-class; even when access to them is easy and free, African American, Hispanic, and lower-income parents all typically favor traditional, "three Rs" schools. To the extent that voucher programs must satisfy diversity claims, therefore, it is arguable that vouchers should be provided for some religious schools but not for these other private schools. This, obviously, would be a highly unexpected twist for the application of diversity considerations to religious schools, since usually proponents of diversity (for either civic toleration-building or autonomy-promoting reasons) come down squarely against the use of vouchers for religious schools precisely on the grounds that they inappropriately segregate students.

cans who were raised on the U.S. mainland from Puerto Ricans who were raised in Puerto Rico or elsewhere. No satisfactory explanation was offered for singling out Mexican Americans but, by implication, excluding from special consideration Hispanics who originate from countries other than Mexico. A special "commitment" is made to African Americans, but apparently none is made to blacks from other parts of the world. This haphazard selection of certain races is a far cry from the "close fit" between the means and the ends that the Constitution demands in order for a racial classification to pass muster under strict scrutiny analysis. . . . (Id. at 851–52.)

11. See generally Gary Orfield et al., *supra* note 5.

12. We call these schools "special emphasis" following the National Center for Education Statistics's *Private School Universe Survey*, 1997–98. See page 28 of that survey, where the various categories of schools are defined.

We should note one significant variation of a “diversity” argument, which focuses more on the overall distribution of institutional possibilities than on the demography of any particular institution. Thus, the argument might go, society in general benefits from the presence of a continuing Amish (or Seventh-Day Adventist or hippie) community, and the only way to assure the maintenance of such communities is to allow (and perhaps even encourage through public subsidy) homogeneous schools that will minimize the likelihood that the young will be tempted to leave these communities. This is, of course, the classic argument linked with pluralism or multiculturalism, which, in some variants, has a distinctly separatist tilt. Although much more could be said about the costs or benefits of a widespread pluralism within a liberal political order — and it is possible that the coauthors would disagree about the assessment of such costs or benefits — we are interested far more in the state’s and children’s interest in encouraging a less separatist form of education by maximizing the presence of diversity within any given educational institution. Moreover, we note Nancy Rosenblum’s important insight that remarkably few partisans of educational vouchers defend their position by offering forthright advocacy of separatist pluralism or multiculturalism.¹³ Instead, the primary defenses appear to emphasize less overtly controversial criteria of “achievement” and “educational quality.” And, as already noted, at least some notions of “educational quality” include reference to the importance of demographic diversity.¹⁴ We thus return to the basic arguments for diversity and attempt to spell out their implications more fully in the sections below.

The Diversity Argument Elaborated: The Importance of “Mingling”

Since their founding in America, “public” or “common” (as they were originally designated) schools have been justified by reference to the social goods that were and are thought to be produced by the process of bringing

13. See Nancy L. Rosenblum, “Separating the Siamese Twins: ‘Pluralism’ and ‘School Choice,’” in *School Choice: The Moral Debate* (Alan Wolfe, ed., 2003).

14. This is not to say that diversity is concomitant with, or even necessary to, educational quality; although our focus in this essay is on the implications of the diversity argument for religious education, it may well be that other goals, such as achievement or equity, are more important. Be that as it may, it is not our purpose here to balance diversity claims against other educational or social norms.

together children of different backgrounds in a single setting. As Horace Bushnell wrote in 1853 of the “great institution . . . of common schools,” “There needs to be some place where, in early childhood, [a child] may be brought together and made acquainted with each other; thus to wear away the sense of distance, otherwise certain to become an established animosity of orders; to form friendships; to be exercised together on a common footing of ingenuous rivalry. . . . Without this he can never be a fully qualified citizen, or prepared to act his part wisely as a citizen.”¹⁵ Similarly, Theodore Roosevelt commented some half-century later, “We stand unalterably in favor of the public school system in its entirety,” because when “Americans of every origin and faith [are] brought up in them,” they “inevitably in after-life have kindlier feelings toward their old school-fellows of different creeds, and look at them with a wiser and manlier charity, than could possibly be the case had they never had the chance to mingle together in their youth.”¹⁶ These high ideals carry into contemporary times. As Stephen Macedo has recently written, “The whole point of the common school is to be a primary arena where children from the different normative perspectives that compose our polity encounter one another in a respectful setting, learn about one another, and discover that their differences do not preclude cooperation and mutual respect as participants in a shared political order.”¹⁷ One might be tempted to ask, with a suitably rhetorical flourish, “If ‘common’ does not mean this, then what *does* it mean?”

All three of these men agreed that a diverse student body is essential for educating citizens. It is generally agreed that citizenship in a liberal democracy requires that one tolerate and even respect people who are different from oneself, who hold different beliefs and engage in actions and life practices that are unfamiliar, discomfiting, or even repugnant. The reason is eminently practical: In a contemporary society consisting of many different groups with quite conflicting ways of understanding the world, a Hobbesian world of endless conflict can be avoided only if individual citizens develop at least enough respect for one another to resist the temptation to suppress those they disagree with or, equally important, to escape the constant anxiety that they will themselves be the targets of suppression if other groups come to power. (The existence of legal “parchment barriers” against such

15. Horace Bushnell, *American Writing on Popular Education: The Nineteenth Century* 182 (Rush Welter, ed., 1971).

16. Quoted in Stephen Macedo, *Diversity and Distrust* 93 (2000).

17. *Id.* at 194.

suppression will scarcely suffice to control the manifold forms of hostility or oppression that can result from antagonistic views of the Other.) In order for people to come to tolerate and respect others, it is generally thought that they need to interact with these “others” in close, meaningful ways that enable them to see the commonalities among them (that serve to generate mutual respect) and at least to understand the reasons for the differences that remain between them.¹⁸ It is also useful if these interactions occur at an early age, before prejudices have the chance to harden and block the development of mutual understanding. Schools are thus seen as being essential, possibly unique, institutions for bringing diverse individuals together under these conditions. As a result, diverse schools are lauded for their service in promoting toleration and civic virtue.

This is no small point. Both of us attribute great — and positive — significance to our experiences growing up in Southern communities with a group of close friends drawn from a variety of Christian religious denominations, ranging from Roman Catholic to Southern Baptist.¹⁹ Not only did we (separately) spend a lot of time discussing and debating fundamental questions of religion, but we also learned, quite obviously, to tolerate the different answers that were given. Sanford Levinson has written about his experiences in Hendersonville, North Carolina, and the importance of ensuing friendships: “We too often automatically sneer at the phrase ‘some of my best friends are Jewish (or any other religion or race),’ but, surely, it would be a profound social good if all of us could in fact say, with conviction, that some of our best friends are from groups other than those with which we most centrally identify.”²⁰ It is hard to believe that societies as heterogeneous as our own can flourish (or perhaps even survive) if the particular intimacies of friendship are limited to those who are exactly like oneself.²¹

18. We put it this way because it might be too heroic an aspiration that everyone accept the substantive “reasonableness” or views — and, even more so, the behavior — of others. One need not believe, for example, that it is truly “reasonable” not to mix milk and meat in order to respect the reasons that lead observant (and even some non-Orthodox) Jews to maintain adherence to this tradition of *kashruth*.

19. See chapter 2. Sanford Levinson notes also the costs of growing up in a segregated society, which meant that all of these friends were white.

20. *Id.* at page 68.

21. This means, among other things, that (liberal) society as a whole almost certainly benefits from the “intermarriages” that are often bewailed by leaders of particular groups. To take what some would consider an extreme example, every marriage of an Israeli Jew with an Israeli Arab, whether Christian or Muslim, would be a cause for rejoicing on the part of any liberal.

We see this same process playing out in schools today. In the eighth grade Boston classroom where Meira Levinson teaches, it has been striking to observe how the presence of even one student from a minority group can over time alter other students’ attitudes toward that group. In one notable discussion, students’ diatribes against the house calls made by Jehovah’s Witnesses were brought to a screeching halt when they discovered that one of the most popular boys in the class was a Jehovah’s Witness. Although the initial change in the tenor of the discussion was undoubtedly due to students’ feeling the need to *show* respect rather than their actually *feeling* more respect, students also then started paying attention to an explanation about *why* Jehovah’s Witnesses proselytized door-to-door — an explanation which they had totally ignored (although it had been brought up by the teacher) earlier in the conversation. Increases in mutual respect have also been brought about by critical confrontation in the classroom. For example, in another class, another student commented that the Chinese are rats²² and turned to the sole Asian student in the classroom for confirmation. When informed that she was Vietnamese, not Chinese, he responded, “Vietnamese, Chinese, whatever” — but was none too pleased a second later to hear the teacher comment, “Yeah, Dominican, Haitian, Puerto Rican, whatever.” This led to a series of discussions about history (Asian, American, Caribbean, Latin American), stereotypes, prejudice, cultural differences, and (of course) eating habits, among other topics, and has noticeably increased some students’ toleration of and understanding of each other, although there is still a long way to go. Furthermore, it has been blindingly clear that this author’s students in a highly integrated Boston middle school are much more wordly and tolerant than her students were in an all-African American middle school in Atlanta, largely because of the relative limitedness of the latter’s experience with Others.

Such anecdotal offerings are bolstered by some social scientists, such as those relied on by the University of Michigan, and in turn a federal district court, when defending the University’s racial- and ethnic-preference programs against Fourteenth Amendment attack. Patricia Y. Gurin, a professor of psychology at the university, prepared a report that found that “[s]tudents . . . are better prepared to become active participants in our pluralistic,

22. Which is, in fact, true of at least some Chinese; see, e.g., Peter Hessler, “A Rat in My Soup,” *The New Yorker*, 24 July 2000, at 38–41. However, the student’s assertion was not made by way of pointing to the remarkable culinary differences among cultures but, rather, as a sign of the true “Otherness” of all Chinese.

democratic society once they leave" what the Court described as "a racially and ethnically diverse student body."²³ The judge also quoted Professor Gurin's finding that such students were also "better able to appreciate the common values and integrative forces that harness differences in pursuit of common ground."²⁴

In addition to diversity's civic accomplishments, student (and sometimes teacher) diversity is also lauded for enabling individual students to develop their capacities for autonomy. This is a distinct educational goal from students' development of civic toleration and respect — although as many people have pointed out (including each of us in other contexts), probably not a distinct pedagogical process; while the goals may be logically separable, their achievement or failure seem not to be separable in practice.²⁵ The aim of helping students develop their autonomy, however, is a distinct justification for maintaining diverse, "common" schools. As children encounter peers and teachers who do and believe different things from themselves, and as they discuss, compare, and debate their own ways of life with others, children necessarily move from accepting their lives simply as unexamined givens to some version of an examined life. Indeed, in explaining his own intellectual development (including developing into a highly self-conscious intellectual), Sanford Levinson gives far greater weight to his friends and his intense discussions with them than to the formal courses taken at Hendersonville High School. And this is not meant as a particular knock at that particular high school; one suspects that many persons could offer similar autobiographical anecdotes even if they attended far more urbane institutions of secondary education.

The material offered by Professor Gurin (and the University of Michigan) is relevant to this strand of the argument as well. She reports that multiple sources of data demonstrate that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions

with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." They are also described as especially able to "understand and consider multiple perspectives [and] deal with the conflicts that different perspectives sometimes create."²⁶ Diversity thus seems an altogether winning policy, insofar as it led Gurin to conclude that on average, students who attend more diverse institutions exhibit a greater "intellectual engagement and motivation index" and a greater "citizenship engagement index."²⁷ In addition, an amicus brief by the United States cited "a study by Alexander Astin, Director of the Higher Education Research Institute at the University of California, in which Astin associates diversity with increased satisfaction in most areas of the college experience and an increased commitment to promoting racial understanding and participation in cultural activities, leadership, and citizenship."²⁸ One could, no doubt, find empirical studies of primary and secondary schools that reach similar conclusions, though, equally without doubt, one could raise all sorts of methodological questions about the ways in which one could actually test with confidence for the qualities allegedly causally linked with diversity.

In sum, diversity in schools is thought (and was historically thought) to be both civic-promoting and autonomy-promoting. Schools with diverse student bodies serve both the community, by promoting the civic virtues of toleration and respect for others, and the individual, by enabling students' development of autonomy through interaction with students who are different. As a result, for both toleration-promoting (civic) and autonomy-promoting (individualistic) reasons, "common schools" with diverse student bodies should be maintained, protected, and further developed, and school diversity should be taken into consideration when examining and evaluating school voucher programs or other school assignment options.

To say that diversity matters, of course, is to leave many questions unanswered. The most obvious is, what kinds of diversity matter? The importance of racial and ethnic diversity is what is being defended in the Michigan (and earlier University of Texas Law School) case, just as gender diversity is assumed insofar as in America (although, notably, not in Great Britain and many other countries), virtually all public schools are coeducational. For both civic and autonomy-promoting reasons, however, it would seem that

23. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822 (2000), citing the Gurin report at 3. It should be obvious that this decision patently conflicts with Judge Friedman's decision several months later in *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (2001). Presumably, the Sixth Circuit Court of Appeals will choose between them (and then, inevitably, the Supreme Court will be given an opportunity to weigh in). See the afterword to chapter 1.

24. *Id.*, quoting the Gurin report, at 5.

25. Meira Levinson, *The Demands of Liberal Education* 101–6 (1999); Amy Gutmann, "Civic Education and Social Diversity," 105/3 *Ethics* 516–34 (1995); Harry Brighouse, "Is There Any Such Thing As Political Liberalism?" 75 *Pacific Philosophical Quarterly* 318–32 (1994); Eamonn Callan, *Creating Citizens* 39–42 (1997).

26. *Gratz v. Bollinger*, at 822, citing the Gurin report, at 5.

27. *Id.*

28. *Id.*, citing Brief for the United States, at 20–21.

religious diversity would be at least as highly desirable. In the next section, therefore, we will examine two questions: (1) Should our measurement of diversity include religious diversity, and if so, what are the implications for both public and private schools? and (2) Do diversity arguments support or undermine vouchers for religious schools?

"Getting Religion"

Should our measurement of student diversity include religious diversity? On civic toleration grounds, the answer *must* be yes. In the United States, there is considerable mutual suspicion between and among conservative Christians, secularist cosmopolitans, liberal and Orthodox Jews,²⁹ atheists, Muslims, Mormons, Wiccans, members of the Nation of Islam, and Scientologists, to name only a few of the relevant groups. Whether or not it is accurate to describe Americans as involved in a "culture war,"³⁰ it is hard to believe that sustained, respectful interaction among members of different religious groups would be not be beneficial to American society. In order to promote the development of a mutually tolerant and respectful civil society, therefore, it would seem that schools should have a student body that is religiously diverse (as well as diverse along other dimensions). Indeed, immediately after university presidents Bowen and Bok speak of the importance of "greater 'cultural awareness across racial lines . . .'" and stronger commitments to improving racial understandings," they go on to write as well of the "importance of differences in religion."³¹ If schools are successful in their efforts to "get religion" in the sense of encouraging attendance by religious students, then their classmates might be considerably more likely to "get religion" at least in the sense of realizing that people holding even exceedingly odd religious views are nonetheless members of the same overarching community.

On autonomy-promoting grounds, it would also seem obvious that children would be well served by going to school with other children from a

29. Whose suspicions of each other is, one suspects, easily as great as any suspicion directed at Jews from outside these communities.

30. Compare, for example, James Davidson Hunter, *Culture Wars* (1991) and *Before the Shoot ing Begins: Searching for Democracy in America's Culture War* (1994) with Alan Wolfe's considerably more optimistic assessment in *One Nation after All: What Middle-Class Americans Really Think about God, Country, Family, Racism, Welfare, Immigration, Homosexuality Work, the Right, the Left, and Each Other* (1998).

31. Bowen and Bok, at 228.

variety of religious backgrounds and genuinely engaging with them in respectful discussion about the ways and reasons their lives are different. Although cultural coherence arguments have some play here — we shouldn't rock a child's foundations before those foundations are even in place — certainly by middle school students should be exposed to practitioners of a variety of religious beliefs if the aim is to help them both to recognize the reasonableness of other beliefs and ways of life and critically examine their own beliefs and practices in service of developing their autonomy. This seems to be especially true for religious diversity, because at least most religions are explicitly about belief, unlike race, social class, gender, and the like. While racial diversity, for example, clearly serves civic toleration ends, it less obviously directly promotes autonomy, insofar as white students cannot choose to become black, for example, and even the questioning of one's assumptions that is the hallmark of autonomy would depend in this case on the questionable assumption itself that racial diversity necessarily implies belief diversity. Religious diversity thus not only promotes children's development of autonomy, but may be superior to other types of diversity in doing so.

This assumption that students' interaction with others will lead to engagement with others (and Otherness) is buttressed by University of Chicago law professor Emily Buss. As she notes in a recent article (and as any parent or, indeed, middle-school teacher knows without needing to read academic tomes), adolescents often withdraw in one measure or another from the intensity of the domestic setting and develop close friendships with peers, who are often those they meet at school. Citing a great deal of evidence from the literature of child development, Buss views such relationships as central to the formation by adolescents of what will, in time, become their mature adult identity. "[I]t is largely through these relationships that [adolescents] pursue the difficult and important task of identity formation — the sorting and selecting of values, beliefs, and tastes that will define their adult selves. Who those peers are and, particularly, the diversity of their convictions and attitudes, will have a significant effect on the course of that development."³²

As a practical matter, this means that some religious children will be likely to be lured away from "home truths" because of the impact of their

32. Emily Buss, "The Adolescent's Stake in the Allocation of Educational Control Between Parent and State," 67 *Univ. Chi. L. Rev.* 1233 (2000).

more secular classmates; it also means, though, that the opposite may occur as well, that a Jewish child will in fact be persuaded that salvation requires acceptance of Jesus as her Savior or simply that a secular child raised in a relentlessly rationalistic household will develop a more "spiritual" posture toward the world than the parents might prefer. So what? It is hard to see how a liberal society can prefer, as an abstract matter, a shift from religious to secular identities, whatever might be the preferences of most people who call themselves liberals. And the fact that the various parents of the respective children might be unhappy about their "straying" from the parents' preferences is not an interest that a liberal society can regard as particularly significant. The primary goals of any such society are the reproduction of its basic commitments (i.e., to a defensible form of liberalism) in future generations and, at the same time, producing the conditions by which students can themselves become autonomous selves and not the mere reflections of their parents' desires as to how they should live their lives.³³

If religious diversity in schools is important for promoting both civic virtue and individual autonomy, then adherents of either goal (liberal civic education or the development of an autonomous self) would have a strong incentive to oppose public vouchers for religious schools if it is true that they would serve both to increase the number of homogeneous schools and to lessen the degree of religious diversity in public schools. (Indeed, strong proponents of these goals should also oppose even private financing of religious schools, as one of us has demonstrated elsewhere,³⁴ but this is obviously a very controversial position. And, thanks to *Pierce v. Society of Sisters*,³⁵ it would also certainly violate currently accepted constitutional norms. In any event, our focus here is only on the advisability of religious school vouchers and similar aid, and not on the legitimacy of religious schools themselves.)

It is to be expected that most religious schools explicitly promote religious segregation. To take the easiest case, a Seventh-Day Adventist or fundamentalist school that is run by and uses curricula supplied by the parent church or like-minded coreligionists is unlikely, as an empirical matter, to attract students from different religious backgrounds, even assuming that the schools in fact have space remaining after serving their primary

constituency of fellow members of the given church. The same is true for a yeshiva or, indeed, Jewish day school. We are aware of a very prominent legal academic, an evangelical Christian, who, having sent his child to a Jewish Day School because he admired its pedagogy and emphasis on values, was told that the child would not be welcome to continue his education there because it was, after all, a *Jewish* day school and the child was obviously not Jewish. (One doesn't know if the school was a bit worried that the child, as an evangelical, would engage in a witnessing of the Good News of Jesus's Messiahship, though we have never detected a propensity on the part of the father to try to convert his Jewish friends, of whom one of us is one.) Catholic schools, interestingly enough, seem quite receptive to non-Catholic students, though it would also be surprising if there were no significant selection biases held by parents who choose to send their children to such schools. (How often do atheist or even agnostic parents choose a Catholic education for their children?)

In addition to segregating by religion students who choose to attend such a school, religious schools also function to promote religious segregation in the public and nonsectarian private schools they leave behind. This is because of the "cream-off effect" mentioned at the opening of our paper. As religious students make use of school vouchers to attend religious schools, fewer religious students will remain back in the public schools, thus reducing religious diversity in these public schools. (Presumably some students using already-available vouchers at nonsectarian private schools would also choose to switch to religious schools once vouchers became available, so the argument would apply to some extent to private schools as well.) This assumes, of course, that a greater proportion of religious students than nonreligious students would choose to avail themselves of vouchers to attend religious schools, but this assumption does not seem unreasonable. This is therefore an additional diversity-based (and ultimately civic and/or autonomy-based) argument against religious school vouchers.

The same grounds that initially seem to mandate against religious school vouchers, however, also mandate in favor of new, positive, religious-diversity promotion policies in the public schools. Religious diversity should be taken into account along with racial, ethnic, socioeconomic, and gender diversity. A heavy-handed program would be to assign students to schools in a way that promotes religious diversity, via altering catchment areas and bus

33. These arguments are spelled out in Meira Levinson, *The Demands of Liberal Education*, *supra* note 25, chs. 1 and 2.

34. *Id.* at 144–45. See also chapter 2 of this volume.

35. 268 U.S. 510 (1925).

routes.³⁶ But a less heavy-handed and more realistic policy could establish schools that act as religious “magnets” to draw religious minorities voluntarily into otherwise religiously homogeneous schools. One “magnet” draw could be an adjusted school schedule that satisfies local board requirements but has longer days on Mondays through Thursdays and half-day Fridays, or plays only Thursday-night football games, or takes off Rosh Hashanah, Eid Fitr, Epiphany, or the Chinese New Year as official school holidays in exchange for extending slightly longer into the summer. Another approach would be to have a vegetarian cafeteria that is compliant with Jewish, Muslim, Buddhist, Jain, or Hindu dietary practices. Both of these strategies are entirely structural and would have no appreciable affect on the curriculum, but could significantly increase the religious diversity of the student body. This could be true as well of a third accommodation, which would be to allow “moments of silent reflection” or the installation of chapels into which, for example, Muslim students could go to say those of their five daily prayers that occur during school hours.³⁷ These would, presumably, alleviate at least some expressed concerns that schools are hostile to even the most minimal expression of religious commitments.³⁸

A third strategy that does have curricular implications, but ones that seem quite minor, would be to broaden or change foreign language offerings at the middle or high school level to include Hebrew, Arabic, Japanese, Hindi, etc., depending on the local population. This approach again might

36. Besides being heavy-handed, one might also be tempted to describe it as unconstitutional. If, though, racial preferences, which are presumptively unconstitutional, can nonetheless be justified because of the “compelling interest” of diversity, as many of their proponents allege, then it would seem that an identical argument would legitimize the otherwise prohibited taking into account of religion when designing catchment areas. See chapter 1; see also Eugene Volokh, “Diversity, Race as Proxy, and Religion as Proxy,” 43 *UCLA L. Rev.* 2059, 2070–76 (1996).

37. See Jodi Wilgoren, “On Campus and on Knees, Facing Mecca,” *New York Times*, 13 February 2001, at 1 (late edition—final), which describes efforts that MIT has made with regard to the increasing number of Muslims on its campus. Indeed, it turns out that the University of Texas Law School, unlike MIT a decidedly state institution, has reserved a room within its library that serves as a chapel for students who wish to make use of it.

38. They also need not be seen as coercing other students into religion. In Meira Levinson’s experience in teaching in Atlanta, at least, where Georgia law mandates forty seconds of daily silent reflection, the time is often spent by middle schoolers trying to stop for silent reflection in the most absurd physical posture possible (in midstep, for example, balanced on one foot, or perched precariously on a desk) or by teachers’ snapping repeatedly, “Quiet! Close your mouths! Silent reflection!” In what at other times felt like an emphatically religious (Christian) setting, especially for a public school, “silent reflection” never seemed to acquire any religious overtones.

attract a number of families who would otherwise either stay in a neighborhood school within a minority-religious enclave, or seek out private religious schools for their children. All of these strategies would have the instrumental goal of encouraging religious diversity on the grounds that it is at least as valuable in pursuing traditional liberal goals as racial and ethnic diversity, at least insofar as the grounds for that pursuit rest on civic-education or individual-autonomy justifications. (If they rely on rectification of past injustices, then the argument takes a decidedly different form, which, interestingly enough, has almost nothing to do with the merits of diversity *per se*.)

Balancing Diversities

The last section concluded that religious diversity matters and is desirable, and that educational policies, including those affecting the public schools, should be designed in order to promote religious diversity. Public schools should innovate in ways to attract minority religious families, but private religious schools should not be aided in attracting those or other religious families to them, as vouchers would presumably do. The normative—even if not the constitutional—policy implications seemed pretty clear. But of course, nothing about public education policies is ever quick or easy, especially when it comes to student assignments. There were (at least) two glaring omissions in the previous section that we need now to include in our analysis. First, religious diversity is not the only desirable kind of diversity to pursue and achieve in a school community. And second, as was implied in the first section, diversity is only a means, and not even a sufficient means, to two ends: children’s development of civic virtue and their development of autonomy. What are the implications of these points in practice? We will take these objections in reverse order, beginning with the recognition that diversity is not and should not be treated as an end in itself.

An extremely diverse school may, whether because its academic programs are substandard, its school culture mean-spirited, or its discipline lousy, get nowhere in promoting the development of mutual civic respect or autonomy among its students. A mostly homogeneous school, on the other hand, may successfully promote both goals because its academic programs are strong, discipline problems do not interfere with student learning, and it promotes a school culture that encourages mutual respect, critical thinking, and interaction with a diverse range of people via community service learn-

ing projects, field trips, after school programs, or Internet projects. If two of the central goals of public education, therefore, are promoting students' development of civic virtue and autonomy, then more than the potential for diversity must be taken into account when evaluating types of schools for inclusion in voucher programs. If private religious schools have better discipline and academics than public schools in the same area, then a well-designed voucher program that includes religious as well as nonsectarian private schools might be desirable.

This is especially true considering that nonsectarian schools comprise only 2.2 percent of the private schools in the United States.³⁹ To restrict school vouchers to nonsectarian schools, therefore, is automatically to exclude 78 percent of private schools in the United States. If there is any reason to favor school vouchers, this should give us pause; no matter whether vouchers are desirable for egalitarian, libertarian, procompetitive "antimonopolistic," academic, or civic reasons, the automatic exclusion of over three-quarters of American private schools without regard to their curriculum, student body, aims and objectives, academic quality, or level of innovation ought to raise eyebrows. This gains further purchase when one considers the practical implementation of vouchers. With approximately 27,400 private schools serving almost 6 million students,⁴⁰ as compared to approximately 90,000 public schools serving over 47 million students, the private sector is already too small to absorb students participating in a large-scale voucher program. To limit vouchers to the 6,025 nonsectarian private schools that existed in 1997–98,⁴¹ plus those that would spring up in response to demand—and how academically, pedagogically, and civically sound could we trust them to be in their first few years of existence, when schools are always struggling to define and establish themselves?—would be to invalidate the effectiveness of vouchers in providing a real range of worthwhile choices for parents before we even started.

It is also worth noting that neither Friends schools nor Episcopal schools

generally even take religious affiliation into account in their student selection process, and also do not rate it as their most important goal. In 1993–94, 0 percent of Friends elementary schools and 2.6 percent of Episcopal elementary schools⁴² (compared with 5 and 1.9 percent of Friends and Episcopal high schools, respectively⁴³) included religious affiliation as an admission requirement at all. Reflecting this apparent lack of religious focus, only 1.6 percent of Episcopal schools and 11.6 percent of Friends schools rated "religious development" as their most important educational goal,⁴⁴ and well under half of these schools rated it as even one of their three most important educational goals.⁴⁵ Given that most of these schools thus neither select students according to religious affiliation nor emphasize religious belief within the curriculum, it would be fair to surmise that many Friends and Episcopal religious schools, at least, might exhibit significant religious diversity.

Even among more religiously oriented and restrictive religious schools, though, religious diversity may be the only type of diversity that is reliably lower in religious schools than in other private or public schools. Let us examine, for example, racial diversity. In terms of raw percentages, Catholic and nonsectarian schools have virtually identical racial minority enrollment—23.4 percent and 23.3 percent, respectively—based on data from the 1997–98 school year. Only 18.8 percent of students in other religious schools (conservative Christian, affiliated, and unaffiliated) are minorities, but it is worth noting that only 19.9 percent of students in regular education nonsectarian schools are minorities; it is only because 27.1 percent of students in private special education and a whopping 38.3 percent of students in nonsectarian special education schools are minorities that nonsectarian schools as a whole achieve the 23.3 percent minority enrollment mark.⁴⁶ By way of comparison, in 1997–98, the public school system, nationally, was 36.5 percent minority.⁴⁷

42. U.S. Department of Education, National Center for Education Statistics, *Private Schools in the United States: A Statistical Profile 1993–94* (2000), table 2.3a.

43. *Id.* at table 2.3b.

44. *Id.* at table 4.1.

45. *Id.* at table 4.2.

46. *PSUS*, table 16, at 21.

47. Digest of Education Statistics, 1999, table 45: Enrollment in Public Elementary and Secondary Schools, by Race or Ethnicity and State: Fall 1996 and Fall 1997 (<http://nces.ed.gov/pubsearch>).

This table offers interesting insights about American demography when it breaks down the percentages by states. Consider, for example, the beginning and end of the alphabet, Alabama

39. U.S. Department of Education, National Center for Education Statistics, *Private Schools Universe Study, 1997–98* (1–2 (1999)) (hereinafter *PSUS*).

40. According to the National Center for Education Statistics, there were 5,971,000 students in private schools and 47,244,000 in public schools in 1999, (<http://nces.ed.gov/fastfacts>). The numbers of schools—89,508 public and 27,402 private—are as of the 1997–98 Digest of Education Statistics (1999), ch. 2, (<http://nces.edu.gov>). The American School Directory, *ASD.com*, states that there are 108,000 public schools, which is, of course, a considerably higher number than that provided by the NCES.

41. *PSUS*, table 1, at 3.

This is, of course, an almost meaningless data point given the vast demographic differences not only among given school districts but also at times within a given school system itself. Almost a half-century after *Brown v. Board of Education*, many school systems continue to look like checkerboards with identifiably “white” and “minority” schools,⁴⁸ underscoring the point that many researchers have made that more important than raw demographic percentages is the actual distribution of different groups within a system or a school.⁴⁹ If we compare the percentage of Catholic, other religious, and regular private nonsectarian schools (which seems the most appropriate comparison, since almost all religious schools offer a regular education program⁵⁰) in which minority students make up 10 to 49 percent of the student body, therefore, we find that 27.7 percent of Catholic schools, 26 percent of other religious schools, and 44.9 percent of regular nonsectarian private schools are racially integrated by this measure.⁵¹ By comparison, 33.4 percent of public schools in 1993–94 were similarly racially integrated (11 to 50 percent minority).⁵² Thus, nonsectarian private schools are far ahead of public schools in promoting racial diversity, and religious private schools are not too far behind.

These statistics are inevitably fairly crude, and many religious schools

and Wyoming. In fall 1997, Alabama's public schools were 61.7 percent white and 36 percent black, together with 0.8 percent Hispanic, 0.7 percent Asian or Pacific Islander, and 0.8 percent American Indian; Wyoming, on the other hand, was 88.6 percent white, and the largest minority groups were Hispanics (6.6 percent) and American Indians (2.95 percent). Blacks accounted for only 1.1 percent of the enrollment. Texas was 45 percent white, 37.9 percent Hispanic, 14.4 percent black, 2.4 percent Asian, and 0.3 percent American Indian, while Massachusetts was 77.5 percent white, 9.7 percent Hispanic, 8.5 percent black, 4.1 percent Asian, and 0.2 percent American Indian. Perhaps most striking is California, where Hispanics in 1997 comprised 40.5 percent of all students and whites 38.8 percent; Asian/Pacific Islanders were 11.1 percent of the total, blacks, 2.5 percent, and American Indians 0.9 percent.

48. See, e.g., James Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* 212 (2001).

49. Jay Greene, “Why School Choice Can Promote Integration,” *Education Week* (12 April 2000), at 72 (also available at <http://www.edweek.org/ew/ewstory.cfm?slug=31greene.h19>); Jay Greene, “Civic Values in Public and Private Schools,” in *Learning from School Choice* (Paul E. Peterson and Bryan C. Hassel, eds., 1998); Sue Ellen Henry and Abe Feuerstein, “‘Now We Go to Their School’: Desegregation and Its Contemporary Legacy,” 68/2 *J. of Negro Education* 164–81 (spring 1999).

50. PSUS, table 8, at 12.

51. PSUS, table 17, at 22.

52. *Private Schools in the United States*, supra note 42, at table 2.6.

will predictably not satisfy these criteria for racial diversity. In 1993–94, Jewish schools were 98 percent white overall,⁵³ and fully 78 percent of Hebrew day schools had no minority enrollment.⁵⁴ (Solomon Schechter schools were better, insofar as only 41.5 percent had no minority enrollment, but 95 percent had less than 10 percent minority enrollment, as did 90 percent of other Jewish schools.) Other religious schools are also likely to be less diverse than the above statistics suggest: AME schools are likely all black, and nearly half of evangelical Lutheran schools are more than 50 percent minority. Nonevangelical Lutheran schools, too, are overall at least 85 to 95 percent white.⁵⁵ In addition, some types of religious schools are likely to be socioeconomically homogeneous: Episcopal schools are likely, save for relatively few scholarship students, to be predominantly middle, if not indeed upper-middle, class; and many small, nonmainstream Protestant schools may be working-class.

It should be obvious, though, that this latter concern about demographic segregation is scarcely limited to private sector schools or even to religious schools within the private sector. Military schools are, we suspect, quite unlikely to draw many poor students, and, almost by definition, they draw only such students whose parents believe in the virtues of military discipline. The same, of course, could be said of “progressive schools.” Not only do schools like Dalton in New York City or Shady Hill in Cambridge, Massachusetts, cost far, far more than most non-well-off families could possibly afford; they also tempt only parents who in fact agree with the particular pedagogic (and ideological) doctrines linked with them. This means that the extent of actual “mingling” may be quite limited.⁵⁶ Although most self-

53. Id. at table 2.5.

54. Id. at table 2.6.

55. Id. at table 2.6.

56. It would be interesting to find out how many Dalton or Shady Hill children, in “mock elections” in 2000, voted for George W. Bush, given that such student votes are a fairly reliable proxy for the views they pick up at home. Meira Levinson can report that only 1 of her 24 students (and only 19 out of 730 students in the school overall) voted for Bush, with the remainder voting overwhelmingly for Al Gore. This presumably reflects the dominantly working-class composition of the school at which she teaches, given that Bush managed to get approximately 20 percent of the Boston vote and, within the state as a whole, approximately 30 percent. See <http://www.state.ma.us/sec/e/e/eidx.htm>, which is the entrypoint for the web page of the Massachusetts Secretary of State and the relevant election statistics for the year 2000. In any event, few of her students have ever encountered other children who actually support (or reflect

styled “progressive” schools, no doubt, explicitly set themselves up to foster and respond to diversity, there is no reason to believe that they attract a particularly diverse clientele. If actually having “representatives” of diverse groups in the classroom is as important as suggested by, say, the University of Michigan, as distinguished from presenting materials *about* such groups, then we suspect that most progressive schools are little better than, say, a Southern Baptist religious academy. There is no evidence, for example, that racial minorities (or the poor more generally) are eager to place their children in progressive schools as against schools that emphasize traditional programs, including emphasis on the “three Rs” and discipline. Moreover, one doubts that many parents with strong religious viewpoints are particularly attracted to schools that are likely dominated by teachers and parents — and by verbally skilled children of these parents — with far more secular identities and viewpoints.

Many of these points could and should be made, of course, with regard to public schools as well. “Public” is not synonymous with “common.” The first refers only to funding and, possibly, to overt state sponsorship; the second, on the other hand, directs our attention to a host of demographic issues having little direct connection to the source of funds. It is obvious that “neighborhood schools” have all sorts of selection biases insofar as American neighborhoods tend to discourage, as a practical matter, the maximalist “mingling” of populations. Most American neighborhoods are segregated at least by race and class, and neighborhood schools tend to reflect this segregation. Furthermore, to the extent that school districts have attempted to overcome residential segregation’s affect on schools through busing, they often simply end up segregating the entire district from others, as the phenomenon of “white flight” — or its cousin “middle-class flight” — contributes to furthering the homogenization of the relevant school districts.

In recognition of this effect, and as a way of responding to increasing “market” pressures, many school districts have tried to make schools more diverse and attract families through voluntary mechanisms. Even these non-neighborhood schools may be little better, however, if they are organized along ideological or pedagogical lines that have predictable selection biases, which is true of many of these “magnet,” “theme,” “specialization,” or

their parents’ support) of the current occupant of the White House, as is evidenced by their frequent declarations that “nobody supports Bush.” One assumes that there were schools elsewhere in the country (even if not in Massachusetts) where student opinion was equally unbalanced in favor of Governor Bush, leading to the impression that “everybody supports Bush.”

“school-to-career” schools. To take one example, we mentioned private-market “progressive” schools a moment ago. Some public school systems, including Cambridge, Massachusetts, have taken to offering similarly “progressive” schools as an alternative, presumably, to more traditionally organized institutions. (One hesitates to call them “unprogressive.”) At least anecdotal evidence suggests that white, upper-middle-class, academically oriented parents, many of them Cantabridgians connected with Harvard or MIT, now consider these public schools to be among the best elementary and middle schools in the community. More to the point, they may even be willing to contemplate sending their children to such public schools rather than, as had been usual, to one or another of the private-market schools that, as a practical matter, had been the standard destination of most such children. That is the good news. The bad news, though, is that the same anecdotalists report that every year these schools get fewer applications from minority and poor families, despite the “controlled choice” system that guarantees all children an equal chance of getting in. Rightly or wrongly, these latter parents prefer a different style of education for their children. Similarly, it should be obvious that an Afrocentric school sponsored by a public school system, even if formally open to any student in the district, is spectacularly unlikely to get more than a handful (if that) of non-African American students.

What these statistics and the civic and personal goals that diversity is supposed to help satisfy may suggest, then, is that receipt of public funds — in the form of direct funding of public schools, or vouchers for private schools — should be contingent either on satisfying certain diversity criteria or on adopting strategies to increase diversity at the school. In the case of public schools, therefore, schools and districts might adopt the religious “magnet” programs discussed above as a way of increasing their religious diversity, while also continuing — or, more accurately, reviving the pursuit of — racial, ethnic, socioeconomic, and other forms of diversity. Private — both religious and nonsectarian — schools that wished to receive public vouchers would need to prove they were already sufficiently diverse (and the meaning of this would obviously need to be debated and clarified in practice), or that they were taking practical, measurable steps to make themselves more so. Some schools would choose to comply; others wouldn’t and therefore would not receive vouchers. And interestingly, as the data above suggests, some religious schools are more likely to be in compliance than some nonsectarian private schools.

It is worth noting that these arguments strongly weigh against any support of home-schooling. Almost by definition, home-schooling works against the kinds of diversity that we, with many others, deem important. It is, obviously, not at all the case that specific home-schooling parents might not be extremely sensitive to the kinds of concerns we are emphasizing and would, therefore, make special efforts to introduce their children to a wide array of people. But we are, to put it mildly, wary either of believing that there will be many such parents or, more important, of accepting as desirable a mode of education that limits the amount of contact that children will have with others during the “schooling” process itself. As several of our earlier anecdotes suggested, the presence of other children can be vital to appreciation of the dangers of facile stereotyping. It may be, for libertarian reasons, that parents should retain, legally, the right to home-school their children. But any such decisions should receive no affirmative public support that might, indeed, serve as an incentive for yet other parents to choose that path.

Note well, though, that the major reason to reject public subsidies for home-schooling must be the acceptance of some version of our argument about the desirability of diversity and its importance with regard both to civic education and development of an autonomous self. If education were merely instrumental, dealing, say, with the acquisition of certain knowledge capable of being tested for on standard examinations, then it is altogether possible that many home-schooled children could do just fine. Indeed, supporters of home-schooling point, with justifiable pride, to the academic success of many home-schooled children, though we have no good evidence about how representative these children are of the entire universe of home-schooled students. Interestingly enough, the voucher proposal that was submitted, and handily rejected by, the California electorate in 2000 included the possibility that home-schooling parents would be entitled to receive public funds to purchase school supplies and the like. That feature itself justified a vote against the proposal, even if someone accepting our overall argument could quite properly support at least some proposals for vouchers or other state aid to a wide variety of non-public, including religious, schools.

Conclusion

These arguments have not been balanced against other norms relevant to vouchers, such as equity or efficiency (and especially not legality). We would

not argue, therefore, that our conclusions about the desirability of promoting religious diversity in public and private schools are definitive insofar as other public goals and goods may lead to other public policies that trump the ones we have put forward here. It is, nonetheless, worth emphasizing the significance — and possible counterintuitiveness — of our conclusions about the importance of religious diversity for both public and private school policy. Proceeding from explicitly liberal assumptions about the desirability of promoting children’s development of civic toleration and individual autonomy, we demonstrated that many religious schools may actually be *more* deserving of vouchers than many nonsectarian private schools, and that public schools can and should do much more to attract minority religious students. Our school communities should be religiously inclusive in addition to being racially, ethnically, and socioeconomically diverse. It is not easy (and may not be possible, even with the institution of creative voluntary measures) to promote all of these at once, and we certainly wouldn’t argue that we have provided any definitive guide to how to balance them. But it is a challenge worth taking on.

Afterword

Two recent cases are relevant to this essay, though neither changes the essential argument. The first is the decision of the Sixth Circuit Court of Appeals in the *Grutter* case arising from the University of Michigan Law School, which is discussed in note 10 of the present essay. The second, substantially more important, case is *Zelman v. Simmons-Harris*, which upheld the constitutionality of a school voucher program in Ohio. There is little doubt that *Zelman* “liberates” states (and the national government) to increase the level of aid to church-related schools, if they wish to do so and if that is made part of an otherwise “neutral” program that aids secular and church-related schools alike. The majority in *Zelman* deemed it irrelevant that 96 percent of the voucher recipients in that case attended church-related schools. The important thing was that that was by choice of the recipients, not the state, and that, in theory at least, they could have used the vouchers in secular schools had they wished to.

As a matter of fact, of course, vouchers remain extremely controversial politically, and there is no reason to believe that all states (or the national government) will rush to emulate the Ohio program. Moreover, a number of states have state constitutions that mandate a “stronger” separation of

church and state than does the First Amendment, at least as construed by the current Supreme Court. Shortly after *Zelman*, for example, a state court in Florida struck down a voucher program on the ground that the Florida constitution prohibited any state funding of church-related education, even when occurring "indirectly" through vouchers. Governor Jeb Bush promised to appeal the decision.

It may be that the most important future litigation will concern not the constitutionality of voucher programs per se, an issue settled at least for the present by *Zelman*, but rather attacks on state constitutional prohibitions of aid on the ground that they constitute a denial of the "equal protection of the law" protected by the Fourteenth Amendment. The argument is that the distinction drawn by the state between aiding secular and religious schools is in fact forbidden discrimination. If one believes, as I certainly do, that it would be unconstitutional to offer aid only to church-related schools, then the obvious question is why it is not similarly unconstitutional to offer aid only to secular schools.⁵⁷ One answer, of course, is that the Constitution explicitly prohibits an "establishment of religion" in a way that it does prohibit an "establishment of secularism," but it takes no great effort to read the Equal Protection Clause, together with the free speech clause of the First Amendment, in ways that, at the very least, make this answer problematic and allow one to assert that, while the state need not aid private education at

all, if it chooses to, it cannot differentiate between secular and religious schools.

A full consideration of this complex question would require another article. Suffice it for now to say that my current view is that the questions raised regarding both aid in general and the differentiation between public and church-related schools are matters for political resolution and that the Constitution does not speak with sufficient clarity to justify judges stepping in to offer their own solutions. Or, what is perhaps more to the point, I no longer view judges as having any special competence, derived either from their formal legal training or their experience in the world, to make decisions regarding such obviously controversial issues, a belief reinforced by the actual performance of the Court over the past thirty years. Almost no one, regardless of his or her place on the political-legal spectrum, believes that the Court during this period has offered a genuinely coherent approach with regard to aid to church-related schools. This may be, of course, because "the Court" is a fiction; it is actually composed of nine justices who may have quite different approaches to the issues presented in a given case. Thus the Court throughout this period has issued a series of 5-4 decisions in which the actual result turns on the often idiosyncratic views of the "ninth judge," whose vote is necessary to break the tie and provide a majority for a given outcome. And, as a matter of fact, there often have not been "majority opinions," indicating the agreement of five justices on a single analysis, but, rather, a number of different opinions that agree only on the specific outcome in the given case.

There is a potential contradiction in my view insofar as I would continue to support the Court's intervening to strike down a "religious-schools only" program of aid even as I would prefer that the Court accept as constitutional a "secular-schools-only" statute. The only real argument I can offer is that the Establishment Clause speaks more strongly with regard to the former than the Equal Protection Clause speaks to the latter.

57. As this book was about to go to press, the Supreme Court granted review of *Davey v. Locke*, a case involving a provision of the Washington State constitution that mandates that "[n]o public money or property shall be appropriated for or applied to any religious . . . instruction." The Washington State Supreme Court has interpreted this to forbid the grant by the state of college scholarships to otherwise eligible students who wish to pursue degrees in theology (as distinguished from students who wish to study about religion in, say, nonsectarian departments of religion, anthropology, or philosophy). One question is whether this constitutes an infringement of the religious believer's rights under the Free Exercise Clause of the First Amendment; another quite independent question is whether it might constitute a violation of the Equal Protection Clause inasmuch as it clearly differentiates between students enrolled in divinity schools, who wish to immerse themselves in the theology of their own religion, and students enrolled in religion departments, who wish to study religion from a more detached perspective. The case will be argued in the fall of 2003 and will, presumably, be decided by the United States Supreme Court in the spring of 2004. As with all legal arguments, there are "broad" and "narrow" approaches to the case, and it is possible that the Court will uphold the claim of the student in a way that has relatively little bearing on the issue of whether the state has a constitutional duty to fund parochial schools if it chooses to help fund, through vouchers or any other program, nonsectarian private schools. But it is equally possible that the Court might decide the case in a way that will resolve, for all intents and purposes, this latter question, whether affirmatively or negatively.